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Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 576th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 22 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/396 and Add.1, A/CN.9/410)

Section 13 (*continued*)

1. **Mr. ABASCAL ZAMORA** (Mexico), referring to the statement he had made at the previous meeting, explained that his idea was not that the paragraphs on documentary evidence should exclude wording which reflected the common law principle of discovery, but that they should include some reference to the civil law tradition on the subject as well. By that, he meant the tradition as it related to arbitration proceedings, not to civil procedure as such. Mexico's arbitration rules, for example, gave arbitrators discretion to deal with evidential matters flexibly, thus allowing room for meeting the differing expectations of the two sides in international proceedings which involved parties from countries with dissimilar legal traditions. That flexibility was what the text should seek to promote.

2. **Mr. HOLTZMANN** (United States of America), referring to the comments made by the representative of France on paragraphs 47-53, said that his own delegation drew a distinction between paragraphs 47-49, which dealt with mechanical matters and whose general content it approved, and paragraphs 50-54, which related to production of documents. While his delegation would prefer paragraphs 50-53, as well as paragraph 54, to remain more or less as they stood, it could also accept a text based on article 24 (3) of the UNCITRAL Rules and the present paragraph 54.

3. **Mr. FOUCHARD** (France) suggested, as a compromise, the deletion of paragraphs 50-53 and their replacement by a text based on article 24 (3) of the UNCITRAL Rules.

4. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Commission accepted the suggestion just made by the representative of France.

5. *It was so agreed.*

Section 14

6. **The CHAIRMAN** noted that there were no comments on section 14.

Section 15

7. **Mr. HOLTZMANN** (United States of America) proposed the deletion of paragraph 63 because of the threat it posed to the enforceability of awards. Since it was a basic principle of justice that witnesses should be heard, where an arbitral tribunal refused to hear a witness for lack of the requisite notice, that refusal might, under some legal systems, render the resulting award unenforceable.

8. **Mr. FOUCHARD** (France) agreed. He had even more concern about paragraphs 60-62, because they expressed a clear preference for a situation in which discussions would take place before the hearing between witnesses and the lawyers acting for the party presenting the witnesses — in other words, a situation in which the witnesses would be "prepared" for the hearing. That was contrary to civil law practice. He could accept paragraph 60, since it was reasonable for the tribunal to have advance notice of details such as the witnesses' names and addresses, but paragraphs 61-63 should be deleted.

9. **Mr. SZURSKI** (Poland) endorsed the comments made by the French representative. Arbitrators should not be encouraged to require the parties to provide witness statements in advance, because inevitably the statements would be prepared by the parties' lawyers and merely signed by the witnesses. At the same time, the practice of advance submission of statements should not be ruled out altogether. He therefore suggested that paragraphs 61 and 62 should be redrafted so as to remove the emphasis in favour of advance submission and that paragraph 63 should be deleted.

10. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said it was true that, from the civil law point of view, the matter of witness requirements in the prehearing stage was covered adequately by paragraph 60, but paragraphs 61 and 62 reflected a different approach. He recommended their retention in order that the text should cater for the many international arbitrations in which parties and their counsel came from countries with differing legal systems.

11. He agreed with the United States representative about the risk inherent in paragraph 63. It should either be deleted, or be modified to express the idea that the tribunal's right to refuse to hear a witness was limited to the situation in which the witness failed to appear, in which case the tribunal would not allow the witness to be called at a second hearing.

12. **Mr. HOLTZMANN** (United States of America) endorsed the observations made by the previous speaker with regard to paragraphs 60-62. Paragraphs 61 and 62 reflected an established practice in many international commercial arbitrations and one which was recommended in the International Bar Association's supplementary rules dated 28 May 1983 governing the presentation and reception of evidence in such arbitrations. In commenting on those two paragraphs, the French representative had alluded to the issue of witness interviews at the prehearing stage. That was dealt with in paragraph 68, which he approved as it stood.

13. With regard to paragraph 63, he had already drawn attention to the danger it represented. The alternative wording suggested by the previous speaker might share that defect.

14. **Mr. LEBEDEV** (Russian Federation) said that the content of section 15 was useful in drawing attention to issues which might arise in the course of the arbitration. However, the text should avoid giving the impression — which he believed it might on a strict reading — that where arbitrators required the parties to submit full signed witness statements before the hearing, failure to meet that requirement would preclude a witness from giving oral evidence at the hearing itself. Furthermore, the submission of a full written statement should depend on the wish of the arbitrators, not on the wish or consent of the party concerned.

15. **Mrs. GREINER** (Observer for Switzerland) said that she could accept the French suggestion to delete paragraphs 61 and 62. However, a compromise solution, which might meet the wishes of both the French and the United States delegations in regard to the text on witness requirements in the prehearing stage, and ensure a certain balance, might be to add a sentence making it clear that, in addition to the practice reflected in those paragraphs, there was another equally common practice.

16. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his country's legal system allowed only for oral testimony in the presence of the parties, lawyers and so on. Either paragraphs 61 and 62 should be deleted or paragraph 61 should be amended to say that parties "might agree" to allow summaries of the statements of witnesses or full signed statements to be submitted.

17. **Mr. FOUCHARD** (France) agreed that the problem might be solved by redrafting as suggested by Switzerland; however, the passage could not remain as it stood. As paragraph 68 said, the preparation of witnesses was considered improper in some legal systems. To obtain statements from them in advance also seemed inadvisable. Witnesses were often employees and would anyway tend to depict circumstances in a certain light. They should testify freely without preparation so that the tribunal could assess their sincerity; otherwise their testimony would be of little value. Paragraphs 61 and 62 should be redrafted and it should be stated that the preparation of the full text of witnesses' statements in advance was not the only possible practice and was not always either legal or advisable.

18. **The CHAIRMAN** said he took it that the Commission was ready to leave the Secretariat to redraft the passage along the lines suggested by Switzerland.

19. **Mr. ABASCAL ZAMORA** (Mexico) asked what would be the consequence if a party did not submit witnesses' statements in advance. Would it mean that the witnesses would not be heard? That might lead to problems in enforcing an award where a party's witness had not been heard because a statement had not been submitted in advance, perhaps because that practice was illegal or not usual in the party's country, and it might plead that it had consequently not had a fair hearing.

20. **The CHAIRMAN** said he was not quite sure what would happen. However, in Singapore, as far as court proceedings were concerned, written testimony was now taken and the witnesses were cross-examined on the basis of that testimony. The new system was generally welcomed.

21. **Mr. ABASCAL ZAMORA** (Mexico) said that he was not criticizing the system but merely pointing out that the present text was not clear.

22. **Mr. HOLTZMANN** (United States of America) said that it was illegal everywhere for a lawyer to "suborn perjury" but that he doubted whether it was illegal anywhere for an arbitrator or a lawyer to tell a witness to write out beforehand what he would say in court.

Section 16

23. **The CHAIRMAN** noted that there were no comments on the section.

Sections 17 and 18

24. **Mr. FOUCHARD** (France) said that the question of multi-party arbitration was of great complexity and that attempts to solve the problem had either failed or led to ineffective measures. He suggested that section 18 be deleted.

25. **Mr. SZURSKI** (Poland) suggested that a phrase be added at the end of paragraph 83 in section 17 referring to the possibility that statements might be written down by a qualified secretary present at the hearing and read through afterwards if requested by the parties to ensure that they had been recorded correctly.

26. Section 18 as its stood did not reflect existing practice in international commercial arbitration. Attention should be drawn to the possibility that parties might call in other parties, sometimes referred to as "interpleaders".

27. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the Polish suggestion to add a new sentence to paragraph 83, noted that there was no objection to it.

28. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) suggested that paragraphs 87 and 88 should be deleted as being outside the topic of organizing arbitral proceedings.

29. **The CHAIRMAN**, after inviting delegations to indicate their attitude, noted that there was no objection to the deletion of paragraphs 87 and 88.

30. **Mr. FOUCHARD** (France) suggested that paragraphs 89 and 90 should also be deleted.

The discussion covered in the summary record was suspended at 3.10 p.m. and resumed at 3.40 p.m.

31. **Mrs. GREINER** (Observer for Switzerland) supported the suggestion to delete paragraphs 89 and 90.

32. **Mr. RENGER** (Germany) said his delegation would be very reluctant to accept that suggestion. It believed that paragraphs 89 and 90 deserved inclusion.

33. **Mr. GRIFFITH** (Australia) suggested that the Secretary of the Commission be asked for his advice on the suggestion.

34. **Ms. BUURE-HÄGGLUND** (Finland) said her delegation would have some hesitation over deleting the whole section on multi-party arbitration. There should at least be a mention in the Notes that the possibility of such arbitration existed, although she would not oppose deletion of the detailed advice set out in paragraphs 89 and 90.

35. **The CHAIRMAN** wondered whether a paragraph might be included simply alerting the arbitrator to the possibility of multi-party arbitration.

36. **Mr. HERRMANN** (Secretary of the Commission) said he could envisage that some problems might arise in regard to paragraph 89, but not in regard to paragraph 90, which simply said that multi-party proceedings could be complicated and a number of factors ought to be taken into consideration when organizing them. Paragraph 90, perhaps with the addition of an introductory sentence, could either remain in its present position in the text or be inserted near the beginning, in the section dealing with the organization of arbitration proceedings. He himself would prefer the second alternative.

37. **Mr. FOUCHARD** (France) agreed that paragraph 90 posed no dangers. He endorsed the Secretary's view that mention should be made of the problems that could arise in multi-party arbitration, and that that was best done earlier in the Notes. It would be sufficient to state that, where more than two parties were involved, certain problems could arise, and that accordingly even more care should be taken in deciding certain matters.

38. **CHOUKRI SBAI** (Observer for Morocco) said that paragraph 90 was unnecessary, since it contained nothing new, and merely listed the same problems as could arise in an arbitration involving only two parties. All the existing paragraphs relating to multi-party arbitration should either be redrafted or deleted altogether.

39. **Mr. SZURSKI** (Poland) found the solution suggested by the Secretary very reasonable. The paragraph proposed could perhaps take the place of the existing paragraph 87.

Section 19

40. **Mr. SZURSKI** (Poland) proposed that paragraph 92 be deleted, since it was obvious that registration would be carried out by the winner in the dispute as the party with an interest in the enforcement of the award.

41. **Mr. HOLTZMANN** (United States of America) said he could not support that proposal because in practice it might be difficult to know which party was the winner: there might be subsequent counter-claims, or the party granted the award might not be satisfied with it. Some laws in fact required the arbitration tribunal to file the award. The wording of paragraph 92 was broad enough to cover all those possibilities, and he urged that it be retained.

42. **Mrs. GREINER** (Observer for Switzerland) said she had some difficulty in understanding the need for section 19, which in her view had nothing to do with organizing an arbitration.

43. **Mr. HERRMANN** (Secretary of the Commission) reminded the Commission that an award did not always signal the end of arbitration proceedings, because partial or interim awards might well be made. Section 19 had been included since it dealt with one of the organizational issues that might have to be addressed by an arbitral tribunal.

44. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the proposal to delete paragraph 92, noted that there was a majority in favour of retaining the paragraph.

The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.

Section 2 (*continued*)

45. **Mr. GRIFFITH** (Australia) said that one point had been passed over in connection with paragraph 15 in section 2. Recalling the discussion that had taken place at the 574th meeting, he proposed that, to guard against any misunderstanding and avoid giving any impression that UNCITRAL was hostile to arbitration institutions, the phrase "(e.g., the UNCITRAL Arbitration Rules or another set of rules)" in the first sentence should be deleted, and the following text inserted after the second sentence: "The UNCITRAL Arbitration Rules may readily be applied. Alternatively, the parties may wish to adopt the rules of an arbitration institution. In this case, it would be necessary to ascertain and stipulate terms under which the arbitration could proceed as an administered arbitration".

46. **Mr. MELIS** (Observer for International Council for Commercial Arbitration) supported that amendment.

47. **Mr. LEBEDEV** (Russian Federation) said that he found it difficult to conceive of a situation in which parties would agree to ad hoc arbitration proceedings without any arbitration rules. In such a case, the proceedings would be subject to the law of the State in which they took place. Under the amendment proposed by the representative of Australia, however, the parties, at the arbitrator's suggestion, would agree to subordinate the proceedings to institutional arbitration rules with all associated forms of control. That would amount to a radical change in the nature of the proceedings and also in the original content and purpose of the paragraph.

48. **Mr. SZURSKI** (Poland) said that he understood the misgivings of the representative of the Russian Federation. He suggested that the second sentence should be amended along the following lines: "In such a case, they may (a) accept regularly applicable UNCITRAL Arbitration Rules or (b) adopt the rules of an administered arbitration institution". The last sentence would be deleted.

49. **Mr. GRIFFITH** (Australia) said that the amendment suggested by the representative of Poland placed more emphasis on the second option than had been intended. The UNCITRAL Arbitration Rules should be given first choice. The second option gave rise to technical difficulties: the institution would have to be consulted, its rules would have to be adapted and there might have to be a waiver of rules that had not been complied with to date.

50. **Mr. ABASCAL ZAMORA** (Mexico) said that if an arbitral tribunal had been set up without an agreement on arbitration rules, there would inevitably be an ad hoc arbitration. The UNCITRAL Arbitration Rules were the only universally recognized rules applicable in such cases. Any attempt to apply the rules of an arbitration institution to the proceedings of a tribunal that was already operating would raise serious problems and could not therefore be recommended as an equally valid alternative.

51. **Mr. CHOUKRI SBAI** (Observer for Morocco) thought that the Polish text, setting out two alternatives, might restrict the freedom of the parties.

52. **Mr. LEBEDEV** (Russian Federation) said that a proposal by arbitrators in favour of institutional arbitration might prove unacceptable and indeed illegal inasmuch as such a proposal would run counter to the institutional arbitration rules concerned. To opt for an institution in spite of its rules would be quite unacceptable.

53. **Mr. HERRMANN** (Secretary of the Commission) said that the original intention of paragraph 15 had not been to take a stand in favour of ad hoc proceedings or of proceedings based on institutional arbitration rules. The idea was that it might be useful to draw inspiration from certain rules in addressing some of the procedural issues that arose in the conduct of proceedings. The paragraph could perhaps be redrafted to suggest that consideration might be given to agreeing on rules governing the conduct of proceedings, as contained, for example, in section III of the UNCITRAL Arbitration Rules, entitled "Arbitral proceedings".

General observation

54. **Mr. ABASCAL ZAMORA** (Mexico) said that, after reviewing the whole draft, he would like to suggest that an emphatic statement should be inserted, perhaps at the beginning of the Notes, urging prospective users to exercise caution and to refrain from seeking the answer to all questions in the document.

55. **The CHAIRMAN** said that the Secretariat would be asked to take care of that point, perhaps under paragraph 9 or 10.

The meeting rose at 5.05 p.m.